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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
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In the Court of Criminal Appeals of Texas

OBINNA EBIKAM,
Appellant
v.
THE STATE OF TEXAS,
Appellee

State's Brief on the Merits
from the
Fourth Court of Appeals, San Antonio, Texas,
No. 04-18-00215-CR
Appeal from Bexar County

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IDENTITY OF TRIAL JUDGE, PARTIES, AND COUNSEL

The trial judge below was the **Honorable Linda Rodriguez**, Senior Judge sitting by assignment, in the Bexar County Court-at-Law no. 13.

The parties to this case are as follows:

1) **Obinna Ebikam** was the defendant in the trial court and appellant in the court of appeals, and he is the petitioner to this Honorable Court.

2) **The State of Texas**, by and through the Bexar County District Attorney's Office, prosecuted the charges in the trial court, was appellee in the Court of Appeals, and is the respondent in this Honorable Court.

The trial attorneys were as follows:

1) Obinna Ebikam was represented by **Jodi Soyars** and **Therese D. Carter**, 310 S. St. Mary's Street, Suite 1830, San Antonio, Texas 78205.

2) The State of Texas was represented by **Nicholas "Nico" LaHood**, District Attorney, and **Alicia Lovett** and **Eric Cuellar**, Assistant District Attorneys, Paul Elizondo Tower, 101 W. Nueva Street, San Antonio, TX 78205.

The appellate attorneys are as follows:

1) Obinna Ebikam was represented by **Michael Robbins**, Assistant Public Defender, Paul Elizondo Tower, 101 W. Nueva Street, Suite 310, San Antonio, TX 78205, in the court of appeals, and by **Richard E. Wetzel**, 1411 West Avenue, Suite 100, Austin, Texas 78701, in this Honorable Court.

2) The State of Texas is represented by **Joe D. Gonzales**, District Attorney, and **Andrew N. Warthen**, Assistant District Attorney, Paul Elizondo Tower, 101 W. Nueva Street, San Antonio, Texas 78205.

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STATEMENT OF THE CASE

The State accepts appellant's Statement of the Case.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument was requested and granted.

ISSUES PRESENTED

APPELLANT'S SOLE ISSUE
Whether a defendant's failure to admit the exact manner and means of an assault as set forth in a charging instrument is a sufficient basis to deny a jury charge on self-defense.

STATE'S RESPONSE
The State agrees that the court of appeals failed to apply the correct standard. But, that failure notwithstanding, the lower court should be affirmed because it correctly concluded that appellant was not entitled to a self-defense instruction.

STATEMENT OF FACTS

The State challenges the factual assertions contained in appellant's brief. *See* Tex. R. App. P. 38.2(a)(1)(B). The State will supply supplemental pertinent facts supported with record references within its response to appellant's points of error. The Reporter's Record will be referenced as "RR," followed by its respective volume number. The Clerk's Record will be referenced as "CR."

SUMMARY OF THE ARGUMENT

The State agrees that the court of appeals was incorrect when it stated that, in order to qualify for a self-defense instruction, one must admit to the exact manner and means alleged in the charging instrument. But, despite that, the court of appeals should be affirmed because appellant was not entitled to a self-defense instruction under the correct standard.

To qualify for a self-defense instruction in an assault case, the record must show, through the defendant's testimony or otherwise, that he admitted to causing bodily injury with the requisite mental state. Here, nothing in the record establishes that appellant ever made such an admission. In fact, he repeatedly and emphatically denied such conduct and argued that any injury he may have caused was merely accidental. Thus, he was not entitled to the requested instruction.

ARGUMENT

I. The court of appeals misapplied the applicable standard, but it should still be affirmed because appellant did not adequately admit to the offense.

Appellant faults the court of appeals for holding that, in order to be entitled to a self-defense instruction, he had to admit to all the elements of the charged offense, including the alleged manner and means. The State agrees that the lower court so held and such a holding requires too much of a defendant. But, because he would not have been entitled to the instruction under the correct standard, the court of appeals should be affirmed.

a. Standard of review

When analyzing a jury charge issue on appeal, a reviewing court first determines if there was an error, and if so, whether the error caused sufficient harm to warrant a reversal. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). "When jury charge error is preserved at trial, the reviewing court must reverse if the error caused some harm." *Rogers v. State*, 550 S.W.3d 190, 191 (Tex. Crim. App. 2018).

Here, there was no error.

b. Applicable law

A person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force. Tex. Penal Code Ann. § 9.31(a). As would be applicable to this case, the person's belief that the force was immediately necessary is presumed to be reasonable if: 1) he knew that the other person unlawfully and with force entered, or was attempting to enter unlawfully and with force, his occupied habitation, 2) he did not provoke the other person, and 3) he was not otherwise engaged in criminal activity. *Id*.

Self-defense is a confession-and-avoidance defense. *Rogers*, 550 S.W.3d at 192. "Under the confession-and-avoidance doctrine . . . a defensive instruction is appropriate only when the defendant admits to every element of the offense and interposes the justification to excuse the otherwise criminal conduct." *Gamino v. State*, 480 S.W.3d 80, 86-87 (Tex. App.—Fort Worth 2015), *aff'd*, 537 S.W.3d 507 (Tex. Crim. App. 2017); *see also Juarez v. State*, 308 S.W.3d 398, 401 (Tex. Crim. App. 2010) ("[A] defendant must admit to all elements of a charged offense before the defendant will be entitled to a defensive instruction."); *Shaw v. State*, 243 S.W.3d 647, 659 (Tex. Crim. App. 2007) ("[A] defensive instruction is only appropriate when the defendant's defensive evidence essentially admits to every element of the offense *including* the culpable mental state . . . ."). Thus, to raise

the issue of self-defense, "the accused must admit the conduct charged in the indictment and then offer self-defense as a justification for the action." *Gamino,* 480 S.W.3d at 87. "As a justification for actions taken, self-defense is inconsistent with a denial of the conduct." *Id.*

A defendant is entitled to a jury instruction on self-defense if the issue of self-defense is raised by the evidence, whether that evidence is strong or weak, unimpeached or contradicted, and regardless of what the trial court may think about the credibility of the defense. *Gamino v. State*, 537 S.W.3d 507, 510 (Tex. Crim. App. 2017). A trial court errs in denying a self-defense instruction if there is some evidence, from any source, when viewed in the light most favorable to the defendant, that will support the elements of self-defense. *Id.*

c. Admitting the elements of the offense does not necessarily mean admitting the manner and means

Appellant was charged with intentionally, knowingly, or recklessly causing bodily injury to Joy Ebo, the victim, by striking her with his hand. (CR 8.) The court of appeals held that "in order to be entitled to a self-defense instruction, [appellant] was required to admit that he struck Ebo with his hand but did so because he reasonably believed striking Ebo with his hand was immediately necessary to protect himself against Ebo's use or attempted use of unlawful force." *Ebikam v. State*, No. 04-18-00215-CR, 2018 Tex. App. LEXIS 8015, at *5 (Tex. App.—San Antonio Oct. 3, 2018, pet. granted) (mem. op., not designated for publication). By doing so, the court of appeals incorrectly stated what a defendant must "confess" to in order to qualify for a self-defense instruction.

In the legal sufficiency context, this Court has stated that the alleged manner and means of committing a result-oriented offense may vary from the evidence presented at trial if they are mere "immaterial non-statutory allegations[.]" *Johnson v. State*, 364 S.W.3d 292, 299 (Tex. Crim. App. 2012). Thus, if the charging instrument states that the defendant caused bodily injury by "hitting the victim with his hand," but the evidence at trial showed that he caused the bodily injury by throwing the victim against a wall, the evidence will still be sufficient because what caused the victim's injury is not the focus or gravamen of the offense. *Id*. at 298-99; *see also Hernandez v. State*, 556 S.W.3d 308, 327 (Tex.

Crim. App. 2018) (op. on reh'g) ("[B]ecause the manner and means by which an aggravated assault is effectuated is not a unit of prosecution for aggravated assault, nor does it describe a unit of prosecution for aggravated assault, the manner-and-means allegation is not included in the hypothetically-correct jury charge and should be disregarded in a legal-sufficiency analysis.").

The same should be true when determining whether a defendant is entitled to a self-defense instruction because the focus is on whether he caused bodily injury, not on *how* he caused bodily injury. Thus, if the information states that the defendant caused bodily injury by "hitting the victim with his hand," but he instead admitted to causing the victim bodily injury by kicking her with his foot, he has still admitted to causing her bodily injury. Therefore, although there was a variance between pleading and proof, the defendant has sufficiently admitted to the elements of the offense as required by the confession-and-avoidance doctrine. *See Holloman v. State*, 948 S.W.2d 349, 352 (Tex. App.—Amarillo 1997, no pet.) ("[I]f evidence is presented which discloses that the defendant used force in repelling the attack of another . . . there is no legitimate reason why he should be denied the defense simply because he refused to admit to using the type of force alleged by the State.").

Here, by requiring admission as to the exact manner and means, the court of appeals went beyond the requirement that the defendant admit to the "elements of

the offense." That is, the element to which he had to admit was causing bodily injury; *how* he did so was immaterial. The lower court cited no case that requires such a specific admission, and the State is aware of none.[1]

[1] In the court of appeals, the State did not argue that appellant had to admit to the manner and means alleged in the information in order to be entitled to a self-defense instruction. Rather, as it does *infra*, the State argued that appellant did not admit to taking any actions with the requisite mental state to cause the victim bodily injury.

d. Nevertheless, the court of appeals should be affirmed because appellant was not entitled to a self-defense instruction

While appellant did not have to admit to *the* injury-causing act alleged by the State, he did have to admit to *an* injury-causing act. He did not.

As stated above, appellant was charged with intentionally, knowingly, or recklessly causing bodily injury to Joy Ebo. (CR 8.) Appellant emphatically denied ever harming Ebo. When asked whether there was "any kind of physical contact between" him and Ebo, he replied, "There wasn't any physical confrontation." (RR3 231.) He denied ever striking or punching Ebo. (RR3 232.) He then stated that he did not know how everything happened. (RR3 232.) During cross-examination, he again denied hitting Ebo and said he did not see if or how she sustained any injuries. (RR3 259-60.)

Thus, appellant denied causing the victim bodily injury, by striking or otherwise, and he denied having any *mens rea* to do so. Likewise, no other evidence—either on its own or taken together with other evidence—established that appellant admitted to performing an assaultive act or had the requisite culpable mental state to do so. *See VanBrackle v. State*, 179 S.W.3d 708, 715 (Tex. App.—Austin 2005, no pet.) ("[A] defendant is not entitled to a jury instruction on self-defense if, through his own testimony or the testimony of others, he claims that he did not perform the assaultive acts alleged, or that he did not have the requisite

culpable mental state, or both.").[2]

Appellant did state that he attempted to "stop" Ebo from entering his apartment by trying to close the door when she attempted to barge inside. (RR3 227-29, 231, 233, 256-57.) Then, because he "didn't want her to get hurt," he "left the door," whereupon she barged in. (RR3 233, 257.) But he never specified what he meant by trying to "stop" her from coming inside. That is, he did not state whether he meant that he tried to close the door upon seeing her but she pushed the door open and entered, or that he held the door in place while she pushed against it—or whether he struck her with the door as she was attempting to enter, causing her bodily injury in the process. He did, however, repeatedly state that, to avoid hurting Ebo and so he could retrieve his phone, he quickly retreated from the door, allowing her to enter. (RR3 229, 331, 233, 257, 259, 261.)

Moreover, at most, appellant claimed that, *if* he caused Ebo any injuries, it was an accident. But this Court has stated that claiming mere accident does not entitle one to a self-defense instruction. *Ex parte Nailor*, 149 S.W.3d 125, 132-34 (Tex. Crim. App. 2004) ("Both trial counsel's argument and appellant's testimony centered on a lack of intent, *i.e.*, it was an accident. . . . Accordingly, appellant

[2] The court of appeals noted that this Court has stated, "Admitting to the conduct does not necessarily mean admitting to every element of the offense." *Ebikam*, 2018 Tex. App. LEXIS 8015, at *4 (quoting *Gamino*, 537 S.W.3d at 512). However, in context, that statement appears to be *dicta* because this Court concluded that Gamino essentially admitted that he exhibited a firearm while intentionally or knowingly threatening bodily injury, meaning he was entitled to the self-defense instruction because he did, in fact, admit to all the elements of aggravated assault. *Gamino*, 537 S.W.3d at 511-12.

was not entitled to an instruction on self-defense.").

Simply stated, nothing in the record established that appellant admitted to causing Ebo bodily injury with the requisite mental state, meaning he was not entitled to the self-defense instruction. And, plainly, if appellant's scant "admissions" in this case are enough to warrant a self-defense instruction, the confession-and-avoidance doctrine as it relates to self-defense is a nullity. But as long as the doctrine remains in effect, one must do more than repeatedly deny any physical confrontation or other assaultive acts and claim that any injuries the victim may have sustained were merely an accident.

Accordingly, the court of appeals correctly concluded that the trial court did not err when it denied appellant's self-defense instruction.[3]

[3] Appellant states that the evidence also entitled him to defense-of-third-person and defense-of-property instructions. (Appellant's Br. at 15.) That would be fine if appellant requested such instructions. But he did not and, therefore, was not entitled to them. *See Mendez v. State*, 545 S.W.3d 548, 553 (Tex. Crim. App. 2018) ("[I]t is uncontested that Mendez never requested a self-defense instruction on the record. The trial judge, then, initially had no duty to charge the jury on the issue of self-defense.").

e. Appellant's alternative argument is unpreserved and inadequately briefed

For the first time on appeal, appellant makes an alternative argument, claiming that, even if he "did not sufficiently admit the alleged assaultive conduct, the jury could have believed Ebo's testimony that [he] struck her with his hand while at the same time believing [his] testimony that his conduct was justified under the law of self-defense." (Appellant's Br. at 15.) Appellant did not raise that argument in the court of appeals or in his petition for review to this Court. Moreover, he cites no law to support that proposition. Accordingly, the State considers it unpreserved and inadequately briefed. Therefore, it will not address it except to say that if appellant's proposed formulation is accepted by this Court, then that will completely obliterate the confession-and-avoidance doctrine. Confession and avoidance means nothing if the defendant can talk out of both sides of his mouth and say, "I didn't cause any injuries. But if, as the State claims, I did cause injuries, I had a good reason for doing so."

PRAYER FOR RELIEF

Counsel for the State prays that this Honorable Court AFFIRM the court of appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Andrew N. Warthen, hereby certify that the total number of words in this brief is 2,343. I also certify that a true and correct copy of this brief was emailed to appellant Obinna Ebikam's attorney, Richard E. Wetzel, at wetzel_law@1411west.com, and to Stacey Soule, State Prosecuting Attorney, at information@spa.texas.gov, on this the 29th day of April, 2019.

/s/*Andrew N. Warthen*
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